Supreme Court, U. S.
FILED
JUL 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1006

HAROLD R. BROWN,
SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

ALBERT EDWARD GLINES,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT

Respondent was a Captain in the Air Force Reserves. He had been evaluated as dedicated, energetic, zealous officer, clearly the most competent navigator within his flight and probably the most competent within his entire group (A.9, Appendix A to this brief), and had accumulated more than 15 years of service in

the Air Force Reserves. (A. 31). Although he was a member of the Reserves, respondent had been on nearly full-time active duty for the two years prior to initiation of this lawsuit. (A. 8).

Respondent was concerned about the negative impact Air Force grooming standards were having on the morale and retention of servicemen in the Air Force; he prepared a petition to members of Congress and the Secretary of Defense to show the widespread dissatisfaction of servicemen with the grooming standards.[1] The substantive portion of the petition stated the following:

> We, the undersigned, all American citizens serving in the armed services of our nation, request your assistance in changing the grooming standards of the United States Air Force.
>
> We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

(A. 18-22) At the time of the events herein, respondent was serving active duty was involved in a navigator instructor upgrade training program. (A. 34).

[1] The record does not include an explanation of how grooming standards caused the problems indicated. Counsel's understanding is that the standards had a disparate effect on Blacks and Whites in the Reserves. Reservists had to satisfy the grooming standards for the weekend-a-month they were on active duty. Persons with tightly-curled hair, often Blacks, could mat their hair while on active duty and comb it out as a civilian to conform with current civilian hair styles. Persons with straight hair, often Whites, had to keep their hair short at all times, remaining out of style with civilian hair styles. This disparate effect caused racial tension.

In April, 1974, during a training flight to Japan, respondent had an overnight stopover at Anderson Air Force Base, Guam. After his plane landed in Guam, respondent handed a ground crew member a copy of the petition. The ground crew member took the petition back to his barracks and, in time, a total of eight servicemen signed the petition. (A. 25-27). For initiating the circulation of his petition in this manner, respondent was removed from active duty and transferred out of the Active Reserves to the Standby Reserves.

SUMMARY OF ARGUMENT

I.

The statutory protection afforded members of military service "communicating with a member of Congress" in 10 U.S.C. §1034 includes communication by petitions. Not only are petitions generally understood as a proper means of communicating with Congress, the right to petition the government has been understood as a fundamental right since colonial times. Furthermore, the legislative history of 10 U.S.C. §1034 demonstrates that it was enacted to open channels of communication between members of the armed services and members of Congress which explicitly included joint petitions.

II.

Respondent should not lose statutory protection even though his petition to members of Congress was directed additionally to the Secretary of Defense. Under *Street* v. *New York*, 394 U.S. 576 (1969) and *Yates* v. *United States*, 354 U.S. 298 (1959), the government

must prove to a certainty that the action taken against respondent was not based in the least degree on his petitions to members of Congress for respondent to lose statutory protection. The government cannot meet this burden.

Furthermore, since the addition of a copy of respondent's petition to the Secretary of Defense serves the congressional goals that underlie 10 U.S.C. §1034, it would be unjust, if not absurd, for respondent to lose statutory protection as a result of directing an additional copy to the Secretary of Defense.

III.

The Court's decision in *Greer* v. *Spock*, 424 U.S. 828 (1976), relied on by the government, is not dispositive of the issues in this case because the nature of the speech interests and the policies involved in the two cases are entirely different. The inability of a civilian national political candidate to make political speeches on a military base has very little impact on the candidate's ability to reach his national audience. However, the inability of a serviceman to circulate a petition to be signed by other servicemen on a military base has a substantial impact on the serviceman's ability to reach his limited audience. Furthermore, the decision to prohibit civilian campaign speeches on base comports with the American constitutional tradition of a politically neutral military establishment under civilian control. However, the decision to prohibit the circulation of petitions to the civilians constitutionally charged with control over the military establishment conflicts with the same constitutional tradition.

Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment Rights," *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1975), and the prior approval requirement is as serious an infringement on the first amendment rights of servicemen as is prior restraints on speech generally. Prior restraints on petitioning on-base can prove tantamount to a prohibition of all petitioning. For servicemen assigned to foreign bases and ships, it has that effect so long as servicemen are assigned to the base or so long as the ship is at sea. If timeliness has importance, a prior restraint amounts to total infringement. In every case, denial of permission to circulate a petition on-base substantially interferes with petitioner's ability to accomplish the desired communication. Furthermore, the prior approval requirement has the same procedural significance as other prior restraints.

Moreover, the broad delegation of authority to military commanders to restrain petitioning on the basis of such amorphous interests as "loyalty," "discipline" and "morale," invites censorship. In every case where permission to circulate on-base has been requested it has been denied, even when the government now admits that denial was wrongful. In the present case, respondent was taken off active duty and removed from the reserves even though his conduct was innocuous.

Applying the analysis employed in *Nebraska Press Association* v. *Stuart, supra*, demonstrates that the prior approval requirement is unnecessary, ineffective and unconstitutional. The danger to military interests

from petitioning is minimal, especially when compared with other forms of protest which may be exercised when the right to petition is denied. Furthermore, there are less restrictive alternatives available to the government to mitigate the dangers that petitioning might present. These alternatives include appropriate time, place and manner restrictions and the broad power of military authorities to punish disruptive petitioning.

ARGUMENT

I

The Court Of Appeals Was Correct In Finding That The Challenged Regulations Violate 10 U.S.C. §1034.

A. The Court of Appeals was correct in finding that the protections afforded armed forces personnel by 10 U.S.C. §1034 include communication by petition.

10 U.S.C. §1034 states:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

In the district court, the Court of Appeals and in this Court, the Government has argued that the protections afforded armed forces personnel by this statute do not extend to communication by petition because (1) the language of the statute is written in the singular and (2) the original incident which prompted

the statute involved a letter. Brief for the petitioners at 37-42. The lower courts in this case and in two other cases found this argument unpersuasive. *Glines* v. *Wade,* 401 F. Supp. 127 (N.D. Cal. 1975), 586 F.2d 675 (9th Cir. 1978), *cert. granted, sub. nom., Brown* v. *Glines,* No. 78-1006 (Mar. 19, 1979); *See, Huff* v. *Secretary of the Navy,* 413 F. Supp. 863 (D.D.C. 1976), 575 F.2d 907 (D.C. Cir. 1978), *cert. granted,* No. 78-599 (Mar. 19, 1979); *Allen* v. *Monger,* 404 F. Supp. 1081 (N.D. Cal. 1975), 583 F.2d 438 (9th Cir. 1978), *petition for cert. pending, sub. nom., Brown* v. *Allen,* No. 78-1005. This Court should find the argument unpersuasive as well.

In its brief the Government asserts that the language "communicating with a member of Congress" in §1034 by its nature omits any reference to petitioning. Brief for the petitioner at 37. But petitioning is certainly generally understood as a proper means of communicating with Congress.

To support an interpretation limiting the meaning of "communicating" to communication by individual letters, the Government's brief refers to portions of the Congressional Record purporting to quote from the Navy Regulations in effect in 1951 which regulated communication with Congress:

> At that time, Articles 1248 and 1249 of Navy Regulations (1948) provided "any letter from a member of the naval service to Congress or to a Congressman which affects the Naval Establishment should be sent through official channels." 97 Cong. Rec. 3776 (1951).

Brief for the petitioners at 38.

In fact, the above quotation is not from the text of Navy Regulations, but from a letter of the Secretary

of the Navy, which in turn quoted an opinion of the Judge Advocate General of the Navy.[2]

[2] The letter was from Francis P. Matthews, Secretary of the Navy and addressed to Congressman Byrnes of Wisconsin. The letter in its entirety is as follows:

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
Washington, March 13, 1951.

Hon. John W. Byrnes,
House of Representatives,
Washington, D. C.

DEAR MR. BYRNES: This is in reply to your letter of February 26, 1951, requesting and interpretation of articles 1248 and 1249, Navy Regulations (1948).

In an opinion dated April 7, 1950, the Judge Advocate General of the Navy, with reference to articles 1248 and 1249, Navy Regulations (1948) stated in conclusion:

"The provisions of the above-quoted articles 1248 and 1249 would seem to be sufficiently broad to cover any communication intended or designed to influence Congress or a Member of Congress to favor or oppose any legislation or appropriations affecting the Naval Establishment, whether pending, proposed, or suggested. Hence, in every case where a person in the naval service desires to send a communication to Congress, or a Member of Congress, the question to be answered by such person is whether his communication concerns legislation or appropriations relating to the Naval Establishment. Such a determination is made by the member of the naval forces at his own risk. If he has any doubt as to whether his proposed letter relates to the Naval Establishment, he should send it via the Secretary of the Navy.

"Accordingly, in the light of the above-quoted articles 1248 and 1249, it appears that any letter from a member of the naval service, to Congress or to a Congressman which affects the Naval Establishment, should be sent through official channels."

I consider this to be the correct interpretation of these articles. You will agree, I am sure to the basic administrative policy on which these articles are based: That the Department of the Navy should at all times be advised as to all matters relating to the Naval Establishment. These articles are not intended to prohibit correspondence between naval personnel and their Congressmen. Whenever correspondence addressed to a Congressman is sent via the Secretary of the Navy, it is, as a matter of policy, forwarded promptly.

Your inquiry in this regard is appreciated and your letter is being further referred to the Chief of Naval Operations for study of your suggestion that the articles might be clarified.

Sincerely yours,
FRANCIS P. MATTHEWS

Article 1248 of Navy Regulations (1948), which was entitled "Communications to the Congress," actually read as follows:

> *All petitions,* remonstrances, memorials and communications from any person *or persons* in the naval service, whether on the active or retired list, addressed to Congress, or to either House thereof, on any subject of legislations relating to the Naval Establishment, whether pending, proposed, or suggested, shall be forwarded through, or as authorized by, the Secretary of the Navy.

97 Cong. Rec. A4977 (1951) (emphasis added).

Contrary to the Government's assertions, this legislative history indicates that the meaning of "communicating" in §1034 does include communicating by petitions since §1034 was enacted to open channels of communication which explicitly included petitions.

Application of other rules of statutory construction suggests the same result. As stated by this Court, "[b]ecause the Act is remedial, it is to be construed broadly to effectuate its purposes." *Abbott Labs.* v. *Portland Retail Druggists,* 425 U.S. 1, 12, (1976).

The Courts of Appeals in *Brown* v. *Glines, supra* (78-1006), *Brown* v. *Allen, supra* (78-1005), and *Secretary of the Navy* v. *Huff, supra* (78-599), extensively

analyzed the language and legislative history of the statute. The majority of the Court of Appeals in *Huff* concluded,

> [T]he legislative history indeed leaves no doubt that the right to present a solitary, individual grievance to a member of Congress is encompassed by §1034. But there is no indication that this is the outer limit of the communication which Congress sought to protect. . . . We would suppose that quite often a soldier's intended communication with Congress could not effectively be accomplished through solitary letters, as, for instance, when the objective is to communicate widespread dissatisfaction concerning a particular grievance, rather than merely the grievance itself.
>
> * * *
>
> Particularly in view of the long and cherished tradition in this country, embodied in the first amendment . . . of collective presentation of grievances to those in authority in the form of petitions, we think it most unlikely that in protecting the right to communicate grievances to Congress, Congress did not intend to protect the right to solicit others to sign such communications.

Huff (78-599 Pet. App. 12a-13a)

The Court of Appeals in *Huff* also noted that D.O.D. Directive No. 1325.6, §III G (1969) refers to §1034 as protecting the right of a member of the armed forces to "petition or present any grievance to any member of Congress." *Huff* (78-599 Pet. App. 12a).

The Court of Appeals in *Allen* and *Glines* reached similar conclusions.

> Congress clearly intended to protect communication with several members of Congress at a time, even though it is used in the singular; while the record is not so clear, it is unlikely that Congress intended to restrict protected communication by more than one member of the armed forces at a time.
>
> We therefore hold that §1034 protects petitioning. The importance petitioning Congress has played in our history, combined with a legislative history that shows Congress concerned to keep communications open despite threats to discipline and a history of verbal changes in the statute that encourages a broad interpretation of its protections, all lead to this conclusion. The right to petition, of course, includes a reasonable opportunity to solicit signatures for the petition.

Allen (78-1005 Pet. App. 10a).

The Courts of Appeals' appreciation for the importance petitioning has played in our history is entirely justified. Not only is the right to petition protected by the First Amendment, but it is a right that was fundamental to the origins of the United States. "It is too often forgotten that the entire *raison d'etre* of the [First] Congress, assembled in Philadelphia, was to petition for redress." G. Wills, *Inventing America*, 57 (1978).

The right to petition was by 1774 a well-established principle of British law,[3] and in the colonies had been

[3] *See*, 1 W. Blackstone, *Commentaries* 138-39, ch. I §4 (Oxford, 1765), *id.* at 143 (American Edition, Philadelphia, 1771):

> 4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary

designated as a fundamental right as early as 1641.[4] The First Congress relied on assembly and petition as "the recognized way of addressing and defining what the seventeenth and eighteenth century Englishmen called 'fundamental law'." G. Wills, *supra*, 54 (1978).

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course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the rights of petitioning the king, or either house of parliament, for the redress of grievances.

(Typeset modernized). *See also*, The English Bill of Rights (1689), *reprinted in*, 1 B. Schwartz, *The Bill of Rights* 43 (1971):

[T]he said lords . . . being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have naturally done) for the vindicating and asserting their ancient rights and liberties, declare . . . that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal. . . .

[4] MASSACHUSETTS BODY OF LIBERTIES, 1641

A Coppie of the Liberties of the
Massachusetts Colonie in New England

12. Every man, whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 73 (1971). Schwartz states, *id.* at 69, "[o]f the documents discussed thus far [English: Magna Carta (1215), Petition of Right (1628), Agreement of the People (1649), A Healing Question (1656), Bill of Rights (1689); American: First Charter of Virginia (1606), Fundamental Orders of Connecticut (1639), Maryland Act for the Liberties of the People (1639)], there is no doubt that the 1641 Massachusetts Act was the most important as a forerunner of the federal Bill of Rights."

The colonies had used group petitions to the King as a means of seeking redress of grievances as early as 1765,[5] and unanimously asserted the right to do so at the First Continental Congress.[6]

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[5] After the Stamp Act in 1765, the colonists convened a Congress to assert their right to be treated as were English citizens. Included in their Declaration was an assertion of the right to petition.

DECLARATION OF RIGHTS AND GRIEVANCES, 1765

The members of this Congress, . . . with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit the circumstances of the said colonies, esteem it our indispensible duty to make the following declarations of our humble opinion respecting the most essential rights and liberaties of the colonists, and of the grievances under which they labor, by reason of several late Acts of Parliment.

. . . .

XIII. That it is the right of the British subjects in these colonies to petition the King or either House of Parliment.

1 B. Schwartz, *The Bill of Rights* 196-98 (1971).

[6] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774

And whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempt to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his majesty's ministers of state:

The good people of the several Colonies . . . justly alarmed at these arbitrary proceedings of parliment and administration, have severally elected, constituted, and appointed deputies to meet and sit in general congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted:

Whereupon the deputies so appointed being now assembled, in a full and free representation of these Colonies, taking into their most serious consideration, the best means

As the states of the new country began erecting their own Constitutions, many included expressions of the rights of their citizens. The first to expressly protect petitioning was Pennsylvania, in 1776.[7] That

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of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, declare,

That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters of compacts, have the following Rights:

. . . .

Resolved, N.C.D. 8. That they have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

1 B. Schwartz, The Bill of Rights 216-17 (1971). The letters "N.C.D." before the resolution indicate that the resolution was adopted *nemine contradicente:* i.e., without dissent. Schwartz, *supra,* at 214. *Cf.,* the Declaration of Independence, ¶ 29 (1776):

In every state of these oppressions we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 254 (1971).

[7] A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PENNSYLVANIA, 1776.

XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

1 B. Schwartz, *The Bill of Rights* 276-77 (1971).

state was followed by similar provisions in Delaware (1776),[8] North Carolina (1776),[9] Massachusetts (1780),[10] New Hampshire (1783),[11] and the territory of

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[8] DELAWARE DECLARATION OF RIGHTS, 1776

A Declaration of the Rights and Fundamental Rules of the Delaware State, formerly stiled, The Government of the counties of New-Castle, Kent and Sussex, upon Delaware.

. . . .

Sect. 9. That every man hath a right to petition the legislature for the redress of grievances in a peaceable and orderly manner.

1 B. Schwartz, *The Bill of Rights* 276-77 (1971).

[9] NORTH CAROLINA DECLARATION OF RIGHTS, 1776

XVIII. That the people have a right to assemble together, to consult for their common goods, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.

1 B. Schwartz, *The Bill of Rights* 286-87 (1971).

[10] Massachusetts' Constitution was not adopted until 1780. A 1778 version had been overwhelmingly rejected by the people for lack of a Bill of Rights, among other reasons. 1 B. Schwartz, *The Bill of Rights* 337 (1971). The Constitution finally passed contained this provision:

XX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and the grievances they suffer.

Id., 372-73.

[11] NEW HAMPSHIRE BILL OF RIGHTS, 1783

XXXII. The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body, by way of petition or remonstrance, redress of wrongs done them, and of the grievances they suffer.

1 B. Schwartz, *The Bill of Rights* 378-79 (1971).

Vermont (1777) (Vermont was not recognized as a state until 1791).[12] *See also,* the Georgia Constitution (1777).[13]

Even though most states had adopted their own Bills of Rights, the 1787 federal Constitution contained no such provisions. 2 B. Schwartz, *The Bill of Rights* 435 (1971) [hereinafter cited as Schwartz]. The lack of a Bill of Rights created serious reservations among Antifederalists about ratification. Seven of eleven states proposed amendments to the Constitution,[14] and one state, North Carolina, refused to ratify the Constitution until a Bill of Rights was included.[15]

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[12] VERMONT DECLARATION OF RIGHTS, 1777

XVIII. That the people have a right to assemble together, to consult for their common good—to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition or remonstrance.

Reprinted in, 1 B. Schwartz, *The Bill of Rights* 324 (1971).

[13] GEORGIA CONSTITUTION, 1777

Art. LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

Reprinted in 1, B. Schwartz, *The Bill of Rights* 300 (1971).

[14] The seven states were Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina. *See,* 2 Schwartz, 627-933. Pennsylvania approved the constitution without amendments, but a minority of the convention circulated a document after the convention that influenced later public opinion as to why a Bill of Rights should be adopted. Schwartz, 628.

[15] 2 Schwartz 932-33.

Four of the seven states that expressed a desire for amendments included in their recommendations a protection for the right to petition.[16]

In 1789, when James Madison assumed the leadership in meeting the widespread demand for a federal Bill of Rights, a consensus had developed among Americans regarding the fundamental rights that the Bill of Rights should protect.[17] Madison recommended to Congress fourteen of the twenty-two state proposals. It is significant that more states recommended the right to petition than recommended free speech, grand jury indictment, double jeopardy, self-incrimination, just compensation, right to counsel, right to confront witnesses, right to know nature of accusation, and that powers not delegated are reserved to the people.[18] There was no challenge to the right to petition during the Congressional debates on the amendments,[19] and it was, of course, included in the First Amendment.

After adoption in the Bill of Rights, the right to petition, intertwined with the right of assembly, has repeatedly been found woven into the very fabric of the United States. *See e.g., United States* v. *Cruikshank,* 92 U.S. 545, 552 (1875); *Thomas* v. *Collins,*

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[16] The four states were Virginia, Maryland, New York, and North Carolina. *See,* 2 Schwartz 729-933. Two days after drawing up its own list of amendments, a motion was made in the Massachusetts convention to add a provision which, in part, protected petitioning. The amendment was denied. 2 Schwartz 680-81.

[17] 2 Schwartz 983.

[18] *See,* 2 Schwartz 1167.

[19] *See,* 2 Schwartz 1054-1167.

323 U.S. 516, 530 (1945); *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967).[20] It has always been recognized as the appropriate mechanism for citizens to inform their elected representatives.[21] It has always included the right to

[20] From *United States* v. *Cruikshank*, 92 U.S. at 552:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of government, republican in from, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

From *Thomas* v. *Collins*, 323 U.S. at 530:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. Cf. DeJogne v. Oregon, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760.

From *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. at 222:

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press.

[21] During the House Debates on the Bill of Rights, a motion was made to add the right of the people "to instruct their representatives." 2 Schwartz 1091. The motion was defeated by Madison's argument that the right to instruct representatives is included in the rights of free speech and petition—particularly in the right of petition. 2 Schwartz 1096. Representative Jackson (Georgia), speaking in favor of the amendment, discussed the

circulate a petition as well as to present an individual grievance.[22] In connection with 10 U.S.C. §1034, it is also linked to maintenance of civilian control over the military establishment.[23]

importance of encouraging the people to communicate with their representatives.

> The people will be encouraged to come forward with their instructions, which will form a fund of useful information for the Legislature. We cannot, I apprehend, be too well informed of the true state, condition, and sentiment of our constituents, and perhaps this is the best mode in our power of obtaining information. I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents. I hope we shall never presume to think that all wisdom of this country is concentred [sic] within the walls of this House. Men, unambitious of distinctions from their fellow-citizens, remain within their own domestic walk, unheard and unseen, possessing all the advantages resulting from a watchful observance of public men and public measures, whose voice, if we would descend to listen to it, would give us knowledge superior to what could be acquired amidst the cares and bustles of a public life . . . .

2 Schwartz 1095-96.

[22] It [the First Amendment] simply protects the petitioners in their right to get up the petition, circulate it for signatures, and have it presented.

II Tucker, *Constitution of the United States* 671 (1899). *See also*, *Yancy* v. *Commonwealth*, 135 Ky. 207, ____, 122 S.W. 123, 124 (1909), construing the right to petition under a state constitution:

> [T]he Bill of Rights confers upon any citizen, or number of citizens, the right to petition the Legislature of the state for any necessary and proper purpose, and if one may lawfully sign his name to a petition to be presented to the Legislature for a proper purpose, he may likewise lawfully circulate the petition and procure others to sign it.

[23] *See*, Remarks of the Honorable Jacob K. Javits, then Congressman from New York, speaking in 1951:

> Mr. Speaker, with millions of Americans serving in the Armed Forces and with the new emphasis upon a civilian

As the Courts of Appeals recognized, the significance of petitioning in this country's history mintended to exclude it from protected communication in §1034 "most unlikely." *Huff* (78-599 Pet. App. 13a).

The Government finally asserts that interpreting §1034 to exclude communication by petition "is supported by good sense" because "circulating a petition on base . . . [produces] an inevitable potential that factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured." Brief for the petitoners at 41-42.

The nature and extent of the harm threatened by on-base petitioning is discussed in section III, B, 2 of this brief, *infra*. At this point, it is sufficient to note that, whatever potential circulating petitions on base has for producing the evil attributed to it, nothing in the language or legislative history of §1034 reflects Congressional concern for such potential. Rather, the value of petitions to communicate widespread dissatisfaction, the clear intention of Congress to open the channels of communication between members of the armed services and members of Congress, and the historical importance of petitioning all suggest that Congress would not have chosen to exclude petitions from the communication protected in §1034.

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army—America's traditional weapon against dictatorship and oppression—the right of Armed Forces personnel to communicate freely with members of Congress is of the utmost importance. It will be recalled that the Congress endeavored to preserve this right inviolate by a new provision . . . [referring to what is now 10 U.S.C. §1034].

97 Cong. Rec. A4977 (1951).

B. The Court of Appeals was correct in finding that regulations placing a prior restraint on all petitioning on military bases were not necessary to the security of the United States.

Regulations which interfere with communications protected by 10 U.S.C. §1034 are improper unless the regulations are necessary to the security of the United States.

The prior approval requirements imposed by the challenged regulations place a prior restraint on all petitioning on military bases. In each of the reported cases where permission was sought to circulate petitions on military bases, such permission was denied. *See, Carlson* v. *Schlesinger,* 511 F.2d 1327 (D.C. Cir. 1975); *Allen* v. *Monger* and *Moses* v. *Foley,* 583 F.2d 438 (9th Cir. 1978), *petition for cert. pending, sub. nom., Brown* v. *Allen,* No. 78-1005; *Brown* v. *Huff,* No. 78-599. In *Huff,* armed forces officials conceded that the denials were wrongful. *Huff* (78-599 Pet. App. 3a).

In reference to these regulations, the Court of Appeals for the Ninth Circuit stated:

> Prior restraints are suspect in the constitutional context. *Nebraska Press Ass'n* v. *Stuart,* 427 U. S. 539, 96 S. Ct. 2791, 49 L. Ed.2d 683 (1976); *New York Times Co.* v. *United States,* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). They stand no better in a statutory setting. Well publicized petitioners may inconvenience the military. Some petitions may even produce division and morale problems, but we cannot say that there is no less restrictive method than total prior restraint to protect the national security. Since the regulations are overbroad and exceed

the needs of the national security, we affirm the district court.

Allen (78-1005 Pet. App. 12a). *See also, Glines* (78-1006 Pet. App. 9a) and *Huff* (78-599 Pet. App. 16a-17a).

This conclusion is justified because of the limited nature and extent of the harm threatened by on-base petitioning; the availability of other measures to mitigate the harm threatened (including reasonable time, place and matter restrictions and punishment for disruptive petitions); and the ineffectiveness of the prior command approval requirement in protecting the military interests. A discussion of these considerations appears in section III, B, below.

II.

IF THIS COURT FINDS THAT THE CHALLENGED REGULATIONS VIOLATE 10 U.S.C. §1034, THE LOWER COURTS' RULINGS IN FAVOR OF RESPONDENT SHOULD BE AFFIRMED.

A. The action taken against respondent was based upon petitions directed to members of Congress as well as a petition to the Secretary of Defense.

It is unnecessary for the Court to separately consider respondent's right to circulate a petition to someone other than a member of Congress. The fact that among the group of petitions respondent circulated one was addressed to the Secretary of Defense is important only if the record "negates the possibility" that the sanction respondent suffered was not

based in the least degree on his petitions to members of Congress. *Street* v. *New York*, 394 U.S. 576, 588 (1969); *Yates* v. *United States*, 354 U.S. 298, 311-312 (1957). *See also, Easton* v. *City of Tulsa*, 415 U.S. 697, n. at 699 (1974); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (White, J., concurring); *United States* v. *Donner*, 497 F.2d 184 (7 Cir. 1974), *cert. den.*, 419 U.S. 1047 (1974).

Street dictates that a sanction cannot stand where the record fails to prove that the sanction was founded exclusively on nonprotected speech activity.[24] Applying the rationale behind *Street* indicates that where, as here, a sanction is imposed for a general violation without a specific designation of the particular offense, there is an "unacceptable danger that the trier of fact will have regarded the [petitions to Congress and the Secretary] as 'intertwined' and have rested the [sanction] on both together." *Street*, 394 U.S. 576, 588 (1969).

The trier of fact for the purposes of respondent's dismissal and transfer is the Air Force. The danger specified in *Street* is eliminated only if the Air Force can sustain its strong burden of proof to enable this Court to say "with certainty" that respondent's petitions to members of Congress were not even a con-

[24] *Street* involved a criminal sanction, but has been extended to include the situation at bar—civil sanctions against a federal employee. *See, Tygrett v. Washington*, 543 F.2d 840 (D.C. Cir 1974) (*Street* applied to sanction against a D.C. police officer); *Waters* v. *Peterson*, 495 F.2d 91 (D.C. Cir. 1973) (*Street* applied to sanction against a Federal Bureau of Census employee). Therefore, assuming *arguendo* that peptitions to the Secretary of Defense are not protected speech, petitioners must nevertheless meet the heavy burden of *Street* before respondent's dismissal and transfer can be accepted.

tributing cause to respondent's dismissal and transfer from the Active Reserves. *Street*, 394 U.S. 576, 589 (1969). If the Court cannot find from the record this degree of certainty, affirming the lower courts' rulings in favor of respondent on the basis of his petitions to members of Congress will satisfy the entire case. The record demonstrates that the Air Force cannot meet this burden.

1. Nowhere in the record is there any indication that petitions to Congress were deemed protected while those to the Secretary of Defense were not. On the contrary, all indications are that any petitioning done by the respondent was considered improper.

2. The District Court treated the petitions as a unit, making no distinction based on the person to whom the petition was to be sent. In its unpublished Opinion and Order of December 12, 1975, the District Court stated:

> In April, 1974, while on Active Duty Status at Travis Air Force Base, [respondent] circulated *a petition* aimed at relaxing Air Force hair-length regulations . . . .
>
> The letter notifying Captain Glines of his dismissal from the Active Reserves and his transfer to the standby Reserves stated that his actions in circulating *the petition* . . . demonstrated that he had failed "to meet the professional standards expected of an officer in the Air Force." . . . [T]he [petitioners] have admitted that *had it not been for the distribution of the petition*, the decision to remove Captain Glines from Active Duty would not have been made at this time.
>
> . . . .
>
> In this case *the evidence established that but for his petitioning activities*, Captain Glines would have . . . remained on Active Duty. . . . .

(A. 31-32, 34) (emphases added).

These conclusions by the District Court further demonstrate that the government treated Captain Glines' petitioning as a single act, and that no distinction was ever made based on the addressees.

3. Colonel Wade's letter of Reassignment and Transfer, dated April 26, 1974 (A. 24) refers to advice Colonel Wade had given respondent not to circulate the petition. *Id.*, ¶2. Since each copy of the petition contains as its final paragraph a statement of the other designated recipients (*see*, A. 18-22), Colonel Wade could easily have informed respondent that petitions to Congressmen were permitted but those to the Secretary of Defense were not. Moreover, the petition originally reviewed by Colonel Wade was a handwritten copy addressed to Senator Cranston. (Clerk's Record, 4, 21).

4. Signatories to the Guam petition testified in affidavits that the petition with which they were involved was Exhibit F-1 to the plaintiff's complaint (A. 18), the petition addressed to Senator Cranston.

> IO: I show you Exhibit F-1 attached to Complaint filed by Captain Glines, and request that you read it and determine whether this is the petition that you came into contact with on that date?
>
> A: Yes, to my knowledge that is the petition, *the exact petition.*

[R. at 166, Affidavit of Sergeant Nilles (emphasis added).]

> Q: Sergeant Wolf, you have seen Exhibit F-1 attached to the Complaint in this matter. Is that exhibit the haircut petition with which you involved [sic] at Anderson Air Force Base, Guam, on or about 15 April, 1974?

A: yes.

(R. at 160, Affidavit of Sergeant Wolf.)

IO: I show you Exhibit F-1, attached to the Complaint filed by Captain Glines. Does that exhibit generally reflect what you read or what you saw and read on or about 15 April, 1974?

A: Yes.

(R. at 274, Affidavit of Sergeant Ellzey.)

5. Prior practice of the military with respect to petitions gives no reason to believe the designated receipient of the petition was of any significance. In *Brown* v. *Huff*, No. 78-599; *Brown* v. *Allen*, No. 78-1005; and *Brown* v. *Moses*, *id.*, prior restraints were applied to petitions addressed solely to members of Congress. *See*, Brief for Petitioners, No. 78-599 at 7 (*Huff*); Petition for Writ of Certiorari, No. 78-1005 at 4 (*Allen*, *Moses*). If the government did not hesitate to apply prior restraints to petitions to Congress in these instances, it cannot now be inferred that no action would have been taken against respondent had he only addressed his petitions to members of Congress.

The record does not, as required by *Street*, negate with certainty the possibility that respondent's dismissal and transfer was at least in part due to his petitioning members of Congress. The most reasonable inference is that his Congressional petitions were indeed a reason for the action taken against him. Therefore, the copy of the petition to the Secretary need not be considered by this Court. If the action taken against respondent is not supportable as to the petitions to Congress, it is supportable as to none. *See, Yates* v. *United States*, 354 U.S. 298, 312 (1957).

B. Protections afforded to armed forces personnel for petitions to members of Congress should be held to include a petition directed additionally to the Secretary of Defense.

Even if the actions taken against respondent had been based solely on his petition to the Secretary of Defense, respondent should not be held to lose statutory protection because he sent an additional copy to the Secretary of Defense.

Respondent's petition to the Secretary of Defense was one of five petitions, each with exactly the same substantive provisions, reworded only so that each would speak directly to its recipient. (A. 18-22). The other four recipients were all members of Congress. The final paragraph of each petition indicated that the signers were similarly petitioning each of the other four recipients "in the hope that one of our elected or appointed officials will help correct this problem." *Id.*

Petitions to Congress that include a petition to the Secretary of Defense was undoubtedly not within the specific contemplation of the Congress that enacted 10 U.S.C. §1034. However, "it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.' " *Eastern Air Lines, Inc.* v. *CAB*, 354 F.2d 507, 510-11 (D.C. Cir. 1965). To construe the statute in this instance, the Court must therefore "[start] from the areas where the legislative intent is readily discernible, and [project] to fair and reasonable corollaries of that intent for the specific issue" at hand. *Montana Power Co.* v. *Federal Power Commission*, 445 F.2d 739, 746 (D.C. Cir. 1971), *cert. den.* 400 U.S. 1013, (1971). *See*, Cardozo, Nature of the Judicial Process 15 (1921).

This Court has stated the guidelines for this method of statutory construction:

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. [citations omitted]. And unjust or absurd consequences are, if possible, to be avoided.

Fleischmann Construction Co. v. *United States,* 270 U.S. 349, 360 (1926). *Cf., Philbrook* v. *Glodgett,* 421 U.S. 707, 713-714 (1975).

The legislative history of 10 U.S.C. §1034 indicates congressional concern with maintaining civilian control over the military establishment. *See,* Extension of Remarks of Hon. Jacob K. Javits, 97 Cong. Rec. A4977 (1951), *supra* p. 15, n.22. In order to maintain civilian control, the Congress must communicate freely with members of the armed forces and with individuals who determine military policies—the Secretary of Defense and the secretaries of the various military branches. *See, supra* p.6, n.1; *see,* also 10 U.S.C. §1034; Cong. Rec. 3776-77, A4977-78 (1951).

For purposes of reforming Air Force grooming regulations, the Secretary of Defense is a logical recipient both of respondent's petition and Congressional inquiries. The Secretary of Defense is the head of the Department of Defense and, as such, has authority, direction, and control over the Department of the Air Force. 10 U.S.C. §133(a); 10 U.S.C. §8010. The Secretary of Defense had been delegated Presidential authority regarding Air Force uniform standards, which includes grooming standards. Exec. Ord. #11390, ¶ 7 (January 24, 1968); 33 Fed. Reg. No. 16 at 841 (1968). Furthermore, no danger to any governmental interest

results from directing a copy of a Congressional petition to the Secretary of Defense.

Respondent's petition to the Secretary of Defense is therefore consistent with the congressional goals that underlie 10 U.S.C. §1034. It would be unjust if not absurd to afford the protection of the statute to one member of the armed forces who petitions Congress while withholding such protection from another member of the armed forces who petitions Congress and demonstrates the courtesy and respect of simultaneously petitioning the Secretary of Defense. Such a result would be especially inappropriate since 10 U.S.C. §1034 is remedial legislation, to be construed broadly. *Abbott Labs.* v. *Portland Retail Druggists,* 425 U.S. 1, (1976).

III.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT REGULATIONS REQUIRING COMMAND APPROVAL PRIOR TO CIRCULATION OF PETITIONS ON A MILITARY BASE VIOLATE THE FIRST AMENDMENT.

A. The Court's decision in *Greer* v. *Spock* is not dispositive of the issues in this case.

It should be obvious that the Court's decision in *Greer* v. *Spock,* 424 U.S. 828 (1976) is not dispositive of the issues in this case. *Greer* involved the right of civilian political campaigners to enter Fort Dix, New Jersey, a "closed" military base, to make political speeches and distribute campaign literature. This case involves the right of military personnel, properly on

a military base, to circulate to other military personnel, properly on a military base, a petition to the government for redress of grievances. While both cases involve prior command approval requirements grounded on the military interest in maintaining loyalty, discipline and morale, the nature of the competing speech interests and the policies involved are entirely different.[25]

The essential dissimilarity between the two speech interests is demonstrated by looking at the impact a denial of permission would have on the individual's ability to accomplish the desired communication. In *Greer*, the respondents were candidates for national political office who were seeking to communicate their ideas and gain political support among voters. The personnel at Fort Dix, and the sum of all personnel on all military bases, were a small percentage of the

[25] Twice in its brief, the Government has quoted the following statement from this Court's opinion in *Greer* v. *Spock* :

> [t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

This statement was certainly not intended by this Court as a constitutional standard which would obviate the need for constitutional analysis. For example, a military commander could not employ the use of the rack or another torture against an unpopular serviceman under his command—no matter how sincere his belief that such action was necessary to avert a clear danger to loyalty, discipline or morale to troops on the base under his command—without his actions being subject to scrutiny under the eighth amendment's protection against cruel and unusual punishment. Nor could he discriminate in advancement on the basis of race, even if equal treatment on the basis of race would negatively impair the loyalty and morale of a majority of his troops.

prospective voters. Though barred from engaging in speech activities on base, the respondents in *Greer* were not impaired in reaching the vast majority of their audience. Furthermore, the respondents in *Greer* could still have reached the on-base audience through paid political advertisements on radio, television and newspaper. Members of national, though minor, political parties, the candidates had their party financial resources available to reach their audience, both civilian and inservice, through the use of expensive means of communication.

In this case, respondent was a Captain in the Air Force Reserves. He was seeking to communicate to members of Congress and the Secretary of Defense widespread dissatisfaction among armed service personnel, demonstrating the signers' belief that "the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy." (A. 18-22). Respondent's audience consisted of government officials and members of the armed services and his resources were limited to his own personal assets. Denied the ability to circulate a petition on-base, respondent was denied the ability to reach his limited audience where he and the other potential petitioners lived and worked. He was prevented from accomplishing his desired communication in the most traditional, logical, and inexpensive manner. In a very practical way, respondent was prevented from accomplishing his desired communication at all.

An individual letter from respondent would only have indicated respondent's individual belief that there was widespread dissatisfaction. A lot of individ-

ual letters might have accomplished the same result as a petition with an equal number of signatures; but it is much more difficult to convince someone to write a letter than sign a petition with the same message, and respondent would have been limited to those personnel with whom he could discuss the problems of Air Force grooming standards in this fashion.[26]

Respondent could not circulate his petition on Guam at all, whether on base or off. Air Force regulations prohibit circulation of petitions in foreign countries without prior approval, both on and off military bases. *See,* Brief for the Petitioners at 20, n.8. During his overnight stopover, respondent didn't have time to even request permission.

Respondent was left with the possibility of circulating his petition in town, out of uniform, if he could have found someplace in town where servicemen gathered. In fact, he left copies of his petition in a few shop windows. (A. 11).

The denial of permission to circulate a petition on base has an even greater impact in situations like that in *Brown* v. *Allen* (78-1006) where the base was an aircraft carrier. In such situations, a prohibition against on-base petitioning results in total infringement of the right to petition during long periods at sea.

[26] It may be that respondent could have stood at a crossroads and called to strangers to discuss the problems of air force grooming standards. However, he would have been hindered by the absence of a petition—the traditional accompaniment to legitimate communication about issues with strangers. To avoid an unlawful assembly, he would have to have called them one by one, or in small groups. Furthermore, to allow respondent to function as a petitioner without a petition, but not as a petitioner with a petition, would be nonsensical.

The essential dissimilarity between applicable policies is evident from this Court's opinion in *Greer.* The Court's opinion initially distinguished decisions involving so-called "open bases," finding that the authorities at Fort Dix had not abandoned any claim of special interest in who walks, talks, or distributes leaflets on the streets of the base. 424 U.S. at 836. The Court *held* that the Fort Dix regulations were valid on their face as part of "the historically unquestioned power of its commanding officer summarily to exclude civilians from the area of his command." *Id.* at 838. Since respondents had no "generalized constitutional right" to engage in first amendment activities on a military base, the prior approval requirements were constitutional on their face. *Id.*

Unlike private citizens, military personnel have a right and affirmative duty to be on a military base and, subject to appropriate limitations, do have a "generalized constitutional right" to engage in First Amendment activities on a military base. *See e.g., United States* v. *Schmidt,* 16 USCMA 57, 36 CMR 213 (1966); *United States* v. *Gray,* 20 USCMA 63, 42 CMR 255 (1970). *See generally,* Moyer, *Justice and the Military,* Chapter 4 (1972). A military base is where a serviceman lives, works and has contacts with other members of the service. His leisure and recreation areas are on a military base as well as the work areas. A military base is where military speech is most likely to take place.

Furthermore, *Greer* involved ratifying a policy of insulating the military from "both the reality and

appearance of acting as a handmaiden for partisan causes of candidates." 424 U.S. 828, 839. The base policy of prohibiting civilian campaign speeches on base was "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control." *Id.*

The speech restrained here was directed to the civilians who are constitutionally charged with responsibility for control of the military, and indicated criticism of military regulations. Policies restraining such speech conflict with this same constitutional tradition.

The government argues that a military base is not a "public forum" and for that reason, *Greer* v. *Spock* applies to this case. *See,* Brief for the Petitioners at 26-27. Respondent does not rely upon the "public forum" doctrine to find constitutional protection for the right to petition. *Cf., Steck* v. *Connally,* 199 F. Supp. 104 (D.D.C. 1961, in which a civil service employee's circulation of a petition to Congress was held protected speech despite the fact that circulation took place at work during working hours.)

However, a military base does possess many of the attributes of a "public forum" for servicemen assigned to the base. Furthermore, as stated by an authority cited by the government,

> No longer does the right to effective freedom of expression turn on the common law property rights of the state, and no longer does it turn on whether the particular place at issue had historically been dedicated to the exercise of First Amendment rights . . . . In each case, the 'crucial question' is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 252-53.

The question of whether one serviceman handing a petition to another serviceman is "basically incompatible" with the normal activity of a military base is not answered by the decision that campaign speeches of civilian political candidates are not incompatible.[27]

B. Taking the important governmental interest served by the challenged regulations into account, the Court of Appeals was correct in finding that the application of a prior restraint on all petitioning on military bases was substantially overbroad.

1. The significance of the prior approval requirement as a prior restraint.

Respondent recognizes that the government's interest in maintaining loyalty, discipline and morale is

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[27] Moreover, as the Court of Appeals noted in *Huff,* the regulations validated in *Greer* dealt only marginally with petitions, if they dealt with petitions at all. The regulation authorizing prior restraint read as follows:

> The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person . . . is prohibited on the Fort Dix Reservations without prior approval . . . .

424 U.S. at 831.

Under this regulation, the only form of "publication" which might include petitions is the catch-all "other writings." This Court's opinion in *Parker* v. *Levy,* 417 U.S. 733, 760 (1974), indicated that military regulations should not be struck for overbreadth if they only marginally intrude upon constitutionally protected activities. For this reason as well, validating the Fort

important. It is just as clear, however, that the right to petition the government for redress of grievances is important and that the means selected to enforce the armed services' interest, a prior restraint on petitioning, is "the most serious and the least tolerable infringement on First Amendment Rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1975).

The government seeks to lessen the significance of the prior restraint in this case, arguing that "[i]n only the most narrow sense is speech restrained by the prior approval requirement." *See*, Brief for the Petitioners at 31. The government, however, fails to appreciate the significance of its prior approval requirement. Professor Tribe describes two distinct reasons for the particular seriousness of prior restraint requirements: (a) "dissemination delayed may prove tantamount to dissemination denied." and (b) "censors uncontrolled by courts tend to deny publication to material protected by the first amendment." Tribe, *American Constitutional Law* at 725 and 726 (1978). Both concerns are involved with the prior approval requirement in the challenged regulations.

(a) Dissemination delayed may prove tantamount to dissemination denied.

As indicated earlier in this brief, denial of permission to circulate a petition on a military base can substantially interfere with the petitioner's ability to accomplish the desired communication. *Supra* pp. 23-24. In the case of military bases in foreign countries,

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Dix regulations has only marginal significance for determining the constitutionality of regulations aimed directly at limiting the right to petition.

regulations require permission to circulate petitions both on and off base. *See*, Brief for the Petitioners at 20, n.8. For ships at sea, denial of permission to circulate on base amounts to total infringement during long periods at sea. Even in the case of domestic bases, denial of permission to circulate a petition on base isolates the circulator from his audience.

Furthermore, in the case of petitions where timeliness is of particular significance, denial of permission can have an impact at least as great as delays on newsworthy articles. *See*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1975). For example, in *Brown* v. *Allen*, (#78-1005) Captain Monger denied permission to circulate a petition asking Congress "to investigate the necessity of having the Hancock make another West Pacific cruise," but might have allowed circulation "well after the Hancock had been deployed . . . when the petition would be of no effect." *Allen* (78-1005 Pet. App. 14a and 12a).

Also involved is the procedural significance of prepublication restraints. As noted by Professor Tribe,

> The extraordinary power of a prior restraint to foreclose timely expression is derived primarily from the body of procedural rules which form a backdrop to the doctrines in this field. An individual who speaks, or a newspaper that publishes, is ordinarily free in a subsequent criminal prosecution to assert the claim that the speech or publication was protected by the first amentmend. But where a prior restraint operates, anyone who ignores it may lose the right to assert that constitutional defense in a subsequent prosecution for ignoring the restraint instead of obeying it while challenging it judicially.

Tribe, *American Constitutional Law* at 726 (1978) [hereinafter cited as Tribe].

Thus, in this case, respondent is limited to raising the facial invalidity of the prior approval requirement even though the actions for which he was punished were completely innocuous. *See,* Pet. App. 13a.

(b) Censors uncontrolled by courts tend to deny publication to material protected by the first amendment.

Professor Tribe describes the problem of "overbroad delegation" as follows:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issues are overbroad because they grant such officials the power to discriminate—to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly. This covert censorship cannot be checked adequately by judicial review of the scheme as applied in particular cases. For first amendment protection often depends on balancing free speech rights and governmental interests in particular situations, which depends in turn on a close, after-the-fact scrutiny of the factual circumstances by the reviewing court. Except in those rare instances in which bad faith is manifest, the abuse of administrative discretion is likely to find shelter behind a record of contradictory testimony and retrospective rationalization. A court may seek to make its own characterization of the expressive activity, but its perception of the facts is inherently subjective. When was a demonstration too obstructive of traffic? A noise too loud? Violence imminent? The tendency is to be satisfied that the evidence is sufficient if the record is not "totally devoid of evidentiary support," the minimal due process standard. Factual review is therefore an unreliable cure for an overbroad delegation, and thus the Supreme Court has consistently chosen facial invalidation of statutes containing essentially standardless delegations in areas affecting first amendment rights.

Tribe, at 733-34.

The dangers of overbroad delegation are particularly significant in the case of military authorities. As stated by Judge Parker in *Carlson* v. *Schlesinger,*

> Military authority is not trained or attuned to the sensitivity involved in questions relating to First Amendment rights. It is quite understandable, therefore, that when confronted with regulatory language as that found in the two regulations, where acknowledged constitutional rights are tempered by such laudable yet amorphous terms as 'morale,' 'loyalty,' and 'discipline,' the commander will favor and make determinative the military considerations.

364 F. Supp. 626, 639-640 (D.D.C. 1973), *rev'd on other grounds* 511 F.2d 1327 (D.C. Cir. 1975).

Thus, in *Brown Huff,* (78-599) the military authorities denied permission to circulate petitions when the government now admits denials were wrongful. *See,* Brief for the Petitioners at 22 n. 10. In *Brown* v. *Allen,* (78-1005) the District Court found that permission to circulate the petitions in that case was wrongfully denied, under the regulations' standards. *See, Allen, supra* (Pet. App. 23a).

In the present case, the extremity of the measures taken against respondent and the statements made concerning respondent's petition eloquently demonstrate the dangers of the prior approval requirement. For preparing his mildly worded petition and initiat-

ing its circulation among eight servicemen, respondent was abruptly taken off active duty and then removed from the Air Force Reserves. (A. 24, Brief for the Petitioners at 8.)

According to Colonel Harley S. Black, commanding officer of Anderson Air Force Base, Guam, respondent's petition, as respectful as it was, "had great potential to bring undue embarrassment on the Air Force." (Clerk's Record at 46). The Colonel's lack of appreciation for the importance of the constitutional liberties involved is clear. He said,

> All told eight of my personnel were signatories to the petition, each feeling, I suspect, it was a 'notable cause' and thus, in need of their support. The members were young, junior enlisted types, all of whom have since been counselled and shown the error of their ways.

(A. 25).

It is no wonder that this Court has described a prior restraint on publication as "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 562 (1975).

2. Applying the analysis employed in *Nebraska Press Association* v. *Stuart*.

The issue before this Court is whether the Court of Appeals was correct in finding that regulations placing a prior restraint on all petitioning on military bases violates the First Amendment. The Court of Appeals applied the analysis employed by this Court in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1975).

"The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect." (Pet App. 12a, *citing, Nebraska Press Ass'n* v. *Stuart, supra.*) The Court of Appeals concluded that the regulations were substantially overbroad. (Pet. App. 13a-14a).

Nebraska Press, like the present case, involved the use of a prior restraint on first amendment rights to protect a recognized, important interest. There the interest was the right to a fair trial; here it is the maintenance of loyalty, discipline and morale. The issue in *Nebraska Press* was not whether the interest in ensuring a fair trial was sufficient to justify some limitation on the exercise of first amendment rights, but whether the use of a prior restraint could be justified as the chosen means. *Nebraska Press, supra* at 561. This Court concluded it could not. *Id* at 570.

In determining that the prior restraint was not justified in *Nebraska Press*, this Court employed a three part test. 427 U.S. 539, 562. Translated into the issues involved in this case, the areas of inquiry should be (a) the nature and extent of the harm threatened; (b) the availability of other measures to mitigate the harm threatened and (c) the effectiveness of the prior command approval requirement in protecting the military interests. To justify the use of a prior restraint here, the government must show that, in light of these three factors, a prior restraint is necessary to avoid the danger. *Id.*

(a) The nature and extent of the harm threatened.

The government has never been very clear about how circulating petitions affects loyalty, discipline

and morale. Rather, the government's brief simply states that "circulating a petition on base [produces] an inevitable potential that factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured," leaving the Court to infer how this result follows from the proposed cause. Brief for the Petitioners at 41-42.

In analyzing the nature and extent of the harm threatened by on-base petitioning, it is important to include only the harm peculiar to petitioning, excluding harm that might result from forms of speeh currently permitted by regulations. Further, the consideration of harm from petitioning must be reduced to the extend that appropriate time, place, and manner restrictions regulate the on-base exercise of petitioning. The government recognizes that "the regulations do not restrict a serviceman's freedom to engage in oral discussions of political topics or other issues either off base or on base." Brief for the Petitioners at 19. Respondent does not dispute the authority of the armed services to impose reasonable restrictions on the time, place and manner of petitioning on base—including limitations on the number of people gathering at one place at one time. *See,* Pet. App. 11a-12a; Respondent's brief in opposition to cert. at 2-3; *Brown* v. *Allen* (78-1005 Pet. App. 30a-32a).

The harm under consideration, then, is limited to the communicative impact which petitioning alone produces.

In the only military petition case which went to trial, Judge Robert Peckham stated, "[d]efendants maintain that circulation of a petition with which

members of a crew might disagree is enough in and of itself to cause disruption on board ship and therefore impair morale." *Brown* v. *Allen* (78-1005 Pet. App. 21a). It is possible that a person holding a view opposing one stated in a petition would become upset seeing a petition when he or she would not have heard an oral communication. However, it is also possible for one to overhear an oral communication when one would not have seen a petition. To argue harm from persons opposing a view stated in a petition suggests that a greater number will be upset by a petition than from an oral discussion—at most a doubtful proposition.

Furthermore, a basic premise of the First Amendment's guarantees is that suppression is not the proper way to avoid the impact of ideas. As noted by the Court of Appeals in this case,

> The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, 'the remedy to be applied is more speech, not enforced silence.' *Whitney* v. *California,* 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

Pet. App. 10a.

As stated by Professor Tribe,

> [I]f the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of

> discussion and awareness. Whatever might in theory be said either way, the choice between "the dangers of suppressing information and the dangers of its misuse if it is freely available" is, ultimately, a choice "that the First Amendment makes for us."

Tribe, at 581. (citation omitted.)

The remaining harm resulting from petitioning can only come from those who agree with a view stated in a petition. The findings of fact in Judge Peckham's opinion indicates that from the military perspective the harm from those who agree comes from the act of solicitation, not the communication to servicemen. Judge Peckham found that Admiral Monger, who had been Captain of the U.S.S. Hancock, "might have permitted circulation of the Hancock petition had it not 'been asking for support in the form of a signature' and been directed to a member of Congress." *Brown* v. *Allen, supra* (Pet. App. 21a).

Aside from giving increased communicative value to a member of Congress by sending a petition with all of the supporting signature, Admiral Monger's fear must be that soliciting signatures on a petition would somehow commit the signers to greater fidelity to a statement than would making, reading or hearing statements on the same issue. In other words, the harm from the act of petitioning would come from the greater seriousness of purpose that may be produced by petitioning the government for redress of grievances rather than just talking, if that be a harm.

Assuming that petitioning does produce greater seriousness of purpose than other forms of expression, that can only be considered harmful if it leads to some further harmful result. Indifference is not in itself an important military value to be protected.

The government has provided no evidence that exercising the right to petition would impel the petitioners to further, harmful acts. In fact, all indications are to the contrary. For example, *Brown* v. *Allen* (78-1005, Pet. cert. pending) originally involved two suits, *Allen* v. *Monger* and *Moses* v. *Foley,* that were consolidated for trial. Each suit had five named plaintiffs. In *Allen,* all named plaintiffs indicated a desire to circulate a petition. *See, Brown* v. *Allen* (78-1005 Pet. App. 16a). In *Moses,* the plaintiffs actually circulated their petition for a week before seeking permission. *See, Brown* v. *Allen, supra* (Pet. App. 18a). At the time, the district court opinion was filed, more than two years after plaintiffs filed suit, four of the plaintiffs were still in the Navy, two of them still assigned to their original ship, the U.S.S. Hancock. There is no indication in the record of these two cases or any of the petition cases, that any of the plaintiffs failed to perform their military duty, despite the fact that they not only declared themselves to be circulators of petitions, but actually filed suit to enforce their right to petition.

The court of Appeals reached the following conclusion:

> We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger,* 167 U.S. App. D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

Pet. App. 11a n.8.

The officials' conduct in petition cases suggests that they were motivated less by a fear of creating factions and discontent than a sense that the act of petitioning the government somehow has an unsavory character.

The government still maintains that denial of permission to circulate the Hancock petition in *Brown* v. *Allen* (78-1005) was proper despite that petition's benign nature. Brief for the petitioners at 22 n.10. That petition stated:

> Dear Congressman Stark,
>
> We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise.

Brown v. *Allen* (78-1005 Pet. at 4 n.3).

In the present case, Col. Black initiated an investigation of the respondent because his respectfully worded petition "had great potential to bring undue embarrassment on the Air Force." (Clerk's Record at 46). On the basis of "embarrassment" and "discredit" (A. 24) this "dedicated," "energetic, zealous officer," "clearly . . . the most competent navigator within [his] flight, and probably the most competent within the entire group" (A. 9), with more than 15 years of service in the Air Force Reserves (A. 31) was removed from active duty and transferred to inactive status.[28]

[28] Respondent's officer evaluations covering September, 1971 through July, 1973 (Clerk's Record 12-20) are included as Appendix A to this brief. These evaluations were intended to be included as a part of the Appendix for this case, but were mistakenly omitted by the government when preparing the Appendix.

To the extent that the officials' distate for petitioning is shared by other members of the armed services, and even if general distaste for the exercise of fundamental liberties can lead to disruption, the solution is for this Court to encourage respect for constitutional rights. It would be ironic, indeed, for this Court to endorse disrespect for those very rights that members of the armed forces voluntarily pledge their lives to protect. "The right to petition Congress for a redress of grievances is too dear to permit its exercise to be limited by petty tyrannies." *United States* v. *Schmidt*, 16 U.S.C.M.A. 57, 61 (1966), (concurring opinion).

(b) The availability of other measures to mitigate the harm threatened.

As indicated earlier, respondent does not dispute the authority of the armed services to impose reasonable restrictions on the time, place and manner of petitioning on base—including limitations on the number of people gathering at one place at one time. (*See, supra* p. 31). So long as such restrictions do not "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . ." they are entirely proper. *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941).

Furthermore, should petitioning activities lead to a disturbance of the peace or threaten good order and discipline, they are punishable under 10 U.S.C. §§916,

917, and 934 (1976), (Articles 116, 117 and 134, respectively, of the Uniform Code of Military Justice [UCMJ]). Moreover, acts done with the intent of causing a disturbance are punishable under 10 U.S.C. §880 (1976) (Article 80 of the UCMJ), without awaiting any disturbance.[29]

[29] 10 U.S.C. §916 (Art. 116) states:

Riot or breach of peace

Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

10 U.S.C. §917 (Art. 117) states:

Provoking speeches or gestures: towards any other person subject to this chapter shall be punished as a court-martial may direct.

10 U.S.C. §934 (Art. 134) states:

General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. §880 (Art. 80) states:

Attempts

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

The Court of Appeals concluded that,

> Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.

(Pet. App. 12a), citing the limitations adopted by Judge Peckham in *Allen* v. *Monger, supra (Brown* v. *Allen* 78-1005 Pet. App. 30a-32a) and approved on appeal.

The government argues that these less restrictive alternatives are not sufficient to mitigate the harm threatened because, "the injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened." Brief for the petitioners at 33. However, the government does not explain how this chain reaction occurs, let alone how the bad result happens before it can be stopped.

The government further complains that "the court of appeals offered no argument showing that [alternative measures] would be adequate to avoid or 'mitigate the effects' of an improper distribution." *Id.* However, the government has provided no basis for finding that less restrictive alternatives would not sufficiently protect the government's interest. Certainly the government has the burden of justifying the use of a prior restraint. "Any system of prior restraints of expression comes to this Court with a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963). In *Nebraska Press*, this Court "reaffirm[ed] that the guarantees of freedom of expression are not an abso-

lute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." 427 U.S. 539, 570.

When a government regulation is aimed at the communicative impact of expressive activity to protect a compelling governmental interest, the government has the burden of showing that the regulation is necessary to protect the asserted interest. Not only must the interest be compelling, the regulation must be narrowly aimed at those permissible objectives so as not unnecessarily to reach expressive conduct protected by the first amendment. Tribe, at 602.

When a government regulation is designed to protect a military interest, it should not be declared unconstitutional if the regulation could validly be applied to numerous situations and invalidly to only 'marginal' situations. *Parker* v. *Levy,* 417 U.S. 733, 760 (1974). However, if the regulation's reach into protected conduct is substantial, it is unconstitutitutional on its face. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

To justify the use of a prior restraint on petitioning in the present regulations, the government must show that this extraordinary measure is necessary to protect loyalty, discipline and morale in all but exceptional circumstances.[30] It is inconceivable that a form

[30] In footnote 11 of its brief, the government states:

> Because this case involves a challenge to the regulations on their faces, the Court must sustain them if *anything* that might have been written and circulated in Guam in 1974—or in a combat-ready missile base in North Dakota in 1980—could possibly present a clear danger to military readiness.

of expression as mild as petitioning presents such an extraordinary threat to loyalty, discipline and morale that the ordinary means of control will not suffice.

It is instructive to compare petitioning with other forms of protest where ordinary measures of control are employed. In *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965. Sup. Ct. Rev. 1, Professor Kalven distinguished three forms of protest:

> It may prove helpful to risk the pretentiousness of distinguishing among three closely related gestures of protest often lumped together in popular discussions of the civil rights movement: revolution, civil disobedience, and protest. A revolutionary gesture is intended as a direct defiance of law and order; it is a declaration of open war; it is coercive and obstructive. It may well be morally justifiable, but only under the stringent conditions by which Western tradition has measured the right to revolution.
>
> * * *

The government here misstates the standard for facial invalidity. The proper standard appears in Tribe: "A law is void on its face if it 'does not aim specifically at evils within the allowable areas of [government] control, but . . . sweeps within its ambit other activities that consitute an exercise 'of protected expressive or associational rights' ". Tribe, at 710, *quoting, Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face since it bans peaceful picketing protected by the first amendment).

The "substantial overbreadth" requirement of *Parker* v. *Levy, supra* does not change the legal standard to a "scintilla" test, but demands that the "sweep" into protected expression be substantial.

The government does not challenge the Court of Appeals' finding that respondent has standing to raise facial invalidity under *Parker* v. *Levy, supra. (See,* Pet. App. 13a).

> Civil disobedience is deliberate violation of law for the sake of protest and as a matter of individual conscience. It is a gesture we associate with Socrates, Thoreau, and conscientious objectors. In the famous formula of Plato's *Apology* and *Crito*, this gesture requires that the actor accept the punishment. It is a refusal to obey the law coupled with a willingness to accept the legal consequences. Insofar as it is symbolic, it is also an intense form of protest.
>
> * * *
>
> Finally, there are the various forms of mass protest in public places using parades, picketing, and so on. Here the essential feature is appeal to public opinion. The intention is not to violate that law, and the claim is one of privilege in the exercise of basic rights.

Kalven, *supra*, at 10-11.

Professor Kalven concluded that, when done in an orderly manner, the last of the three is protected by the first amendment. *Id.* at 12. Quoting from *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) Professor Kalven noted:

> The memorable thing about *Edwards* was that Mr. Justice Stewart, speaking for everyone but Mr. Justice Clark, said of the defendants and of their "rights of free speech, free assembly, and freedom to petition for redress of their grievances": *"The circumstances of this case reflect an exercise of these basic constitutional rights in their most pristine and classic form."*

Id. at 6-7 (emphasis in original).

Viewed in this perspective, peaceful petitioning involves the exercise of "basic constitutional rights in [its] most pristine form." Furthermore, among the various forms of peaceful protest, petitioning is the most peaceful, least disruptive of all.

Contrast the exercise of the right to petition by Captain Glines in this case with the form of protest exercised by Captain Levy in *Parker* v. *Levy*, 417 U.S. 733 (1974). Levy was a physician assigned as Chief of the Dermatological Service at the base hospital, Fort Jackson, South Carolina. During the summer of 1966, Captain Levy made several public statements to enlisted personnel at the base, urging them not to obey orders to go to Vietnam and not to fight if they did go. The following statement was representative:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: They should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Parker, supra at 737. In conjunction with these statements, Captain Levy refused to follow orders to perform his training duties "because of his medical ethics." *Parker, supra* at 736.

Captain Levy's conduct would be classified as a 'revolutionary' gesture by Professor Kalven. It was clearly inappropriate for a military officer and, if effective, would have substantially interfered with the military mission of the base, training special forces

aides. *Id.* Yet, the government employed the ordinary procedures for enforcement of military obligations.

> Appellee's military superiors originally contemplated nonjudicial proceedings against him under Art. 15 of the Uniform Code of Military Justice, 10 U.S.C. §815, but later determined that court-martial proceedings were appropriate. The specification under Art. 90 alleged that appellee willfully disobeyed the hospital commandant's order to establish the training program, in violation of that article, which punishes anyone subject to the Uniform Code of Military Justice who "willfully disobeys a lawful command of his superior commissioned officer." Statements to enlisted personnel were listed as specifications under the charges of violating Arts. 133 and 134 of the Code. Article 133 provides for the punishment of "conduct unbecoming an officer and a gentleman," while Art. 134 proscribes, *interalia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

Parker, supra at 737-38.

It is inconceivalbe that the milder form of expression, petitioning, could not be satisfactorily managed by these same measures.

Finally, military commanders are in a unique position to mitigate dangers which might accompany the exericse of first amendment freedoms. As stated by Judge Peckham in *Allen* v. *Monger, supra*:

> As Captains of their respective ships, Admirals Monger and Foley exerted considerable leadership on their crews. Admiral Monger had successfully asserted the principles of racial equality on board ship and had had a substantial impact in lessening racial tensions by informing the crew that racism was not to be tolerated on board ship. If either Captain had informed the crew that the free expression of differing views was not only to be tolerated, but to be encouraged in a free society, such leadership would have had a substantial impact in lessening the disruption, if any, which might be caused by circulation of a petition.

(Pet. App. 22a). These observations are equally applicable to commanders of land bases.

(c) The effectiveness of the prior command approval requirement in protecting the military interests.

The third and final consideration employed in *Nebraska Press* is the effectiveness of the prior restraint in serving the asserted interests. Even if circulating petitions on base were to present serious dangers and even if there were no other remedies available to the government to mitigate those dangers, the government should be required to demonstrate the effectiveness of the prior restraint before servicemen desiring to exercise the right to petition are forced to tolerate the least tolerable infringement on this fundamental constitutional right.

The government's asserted interest is defined in the regulations as "loyalty," "discipline" and "morale". The loyalty of those servicemen who value our form of government is certainly not increased when they are denied the right to petition the government for redress of grievances. "Loyal" is defined in Webster's New Collegiate Dictionary (1977) as "faithful in allegiance to one's lawful sovereign or government." Our Pledge of Allegiance is made to a symbol of a republic: "a government in which supreme power re-

sides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law." *Id.* at 983.

Furthermore, it is unlikely that the morale of servicemen who value their constitutional rights is increased when they are denied constitutional rights. Only those servicemen who, like Col. Black, care little for fundamental liberties are disspirited when citizens exercise their constitutional rights. The measures recommended by Judge Peckham, *supra* p. 40, provide a more constitutionally palatable means of promoting those servicemen's morale.

The remaining governmental interest is discipline. If denying the right to petition were enough to stifle a serviceman's concern about his grievances, these regulations might promote discipline. However, concern about serious grievances is not likely to disappear simply because the right to petition is suppressed. Furthermore, only petitions about serious grievances could arguably justify suppression under the regulations.

As noted by Professor Kalven, *supra* p. 38, there are many different forms of protest, even when limiting consideration to different forms of expression. Parades, picketing, sit-in demonstrations, counselling disobedience and revolution, all present more dangers to military interests than does peaceful petitioning. Furthermore, serious grievances can spawn other, more destructive non-speech measures of protest, when peaceful petitioning is eliminated.

Grievances stemming from the Vietnam war spawned many protests, military as well as civilian.

Among those protests were the anti-war petitions in *Carlson* v. *Schlesinger, supra* and the amnesty petition in *Brown* v. *Huff,* (78-599, *see,* Pet. App. 3a, n.2). Another of those protests is described in *Chenoweth* v. *Van Arsdall,* Mis. No. 73-1 (USCMA Mar. 13, 1973), 1 Mil. L. Rptr 2098 (1973). In that case Patrick Chenoweth, an enlisted man in the United States Navy, was charged with dropping a wrench or other metallic object into the gears of the U.S.S. Ranger, an aircraft carrier docked in the United States pending departure to the Western Pacific. The wrench caused extensive damage to the main reduction gears of the Ranger's number 4 engine. Repair of this damage, at a cost of about $800,000.00, delayed the departure of the Ranger for several months.

Not only is petitioning far less damaging to military interests than the form of protest exercised in *Chenoweth,* participants in petitions to the government are quite visible. Should petitioning lead to disruption, the participants can easily be controlled and called to account. Patrick Chenoweth was acquitted. *See,* Affidavit of Eric A. Seitz, appended hereto as Appendix B.

C. Conclusions

Placing little value in the importance of the right to petition the government for redress of grievances, the armed services have placed a prior restraint on all petitioning on military bases. Each time a request has been made to circulate a petition on base, the request has been denied. It hasn't mattered what the nature of the particular petition was. There was an anti-war petition *(Carlson),* a petition supporting amnesty *(Huff),* a petition about the age of a ship *(Allen)* and

one about a ship's home port *(Moses)*. There were polite petitions, *e.g., Allen*, and petitions with strident language, *e.g., Moses*. There were petitions overseas, *e.g., Huff*, and petitions at domestic ports, *e.g., Allen* and *Moses*. All requests were denied. When respondent circulated his petition about grooming standards to eight servicemen, he was removed from active duty and kicked out of the Air Force Reserves.

Five times servicemen have come to the federal courts for relief from the armed service's prior restraint. In four of those cases, the federal courts have granted the requested relief. Respondent requests that this Court find the prior restraint on all on-base petitioning to be unconstitutional.

It is respondent's contention that this prior restraint is unnecessary and ineffective and, like most prior restraints, unconstitutional. Restraining petitioning does not eliminate the concerns which spawn petitions, and military interests would be better served by taking steps to insure that petitioning is done peacefully rather than restraining it. Unlike other forms of protest, peaceful petitioning is consistent with civility and compatible with military service.

Respondent would conclude as did Mr. Justice Rehnquist of this court in a speech republished in the Indiana Law Journal:

> I would like to return finally to another quotation from Learned Hand:
>
> > What do we mean when we say that first of all we seek liberty? I often wonder whether or not we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

I would not underrate the importance of constitutions or laws in preserving freedom of expression, any more than would Judge Hand, but I would be very skeptical that what they can do by themselves is sufficient to preserve informed public discussion. The truly resolute political revivalist will not be deterred by the threat of being driven from the podium. Indeed, he may glory in it. The zealot will not be turned aside by barbed words or sneering looks. But surely freedom of expression is too important a matter to be left entirely to political revivalists and to zealots. There must be room in the process for the less positive, thele ss informed, the thin-skinned. But only in an atmosphere of civility can these forensic late bloomers be expected to play the game.

Judge Hand says the ultimate fate of freedom, and surely he would include here freedom of expression, is reposed in the hearts and minds of men and women. An atmosphere of civility is an indirect assurance of continuing to maintain the broad based support of this liberty in its fullest form in the minds and the hearts of the men and women of this country. These men and women are not apt to rise up in its defense if they feel that freedom of expression is the prerogative of only a few, in which they do not participate and from which they derive no benefit. They are even less apt to rise to its defense if those who claim the freedom for themselves would deny it to others. I am convinced, however, that so long as the men and women of this country can believe that the process of debate and discussion is not simply the special preserve of some small group,

> but is instead a process in which all may participate and from which all will benefit, this freedome will be secure in their minds and hearts.

Rehnquist,"Civility and Freedom of Speech," 49 Indiana Law Journal 6-7 (1973).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

/s/ David M. COBIN
David M. Cobin
Court-appointed Attorney
for Respondent

APPENDIX

17 JUL 1972
22135 PM

PROCESSED BY DPABPE

I. IDENTIFICATION DATA (Read AFM 36-10 carefully before filling entries)

1. LAST NAME—FIRST NAME—MIDDLE INITIAL	2. AFSN	3. ACTIVE DUTY GRADE	4. PERMANENT GRADE
Glines, Albert E	552-52-9680FV	NONEAD	Captain

5. ORGANIZATION, COMMAND AND LOCATION	6. AERO RATING	CODE	7. PERIOD OF REPORT	
314th Tac Alft Sq McClellan AFB, Calif (AFRES)	Sr Nav	1	FROM: 30 Sep 71	THRU: 31 May 72
	8. PERIOD OF SUPERVISION: 306		9. REASON FOR REPORT: CRO	

II. DUTIES—PAFSC 15358 **DAFSC** 15358 Navigator, Airlift (Squadron Level)

Obtains and presents briefing information. Prepares mission documents and flight plans. Provides, tests, and inspects navigational equipment prior to missions. Navigates aircraft on transport missions by pilotage, dead reckoning, celestial, and other means. Accomplishes additional administrative work as directed.

III. RATING FACTORS (Consider how this officer is performing on his job.)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES	○	SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB.	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB.	WELL INFORMED ON MOST PHASES OF HIS JOB.	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB.	EXCEPTIONAL UNDERSTANDING OF HIS JOB. EXTREMELY WELL INFORMED ON ALL PHASES. ☒
2. PERFORMANCE OF DUTIES	○	QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS.	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS.	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY.	PRODUCES VERY HIGH QUANTITY AND QUALITY OF WORK. MEETS ALL SUSPENSES.	QUALITY AND QUANTITY OF WORK ARE CLEARLY SUPERIOR AND TIMELY. ☒
3. EFFECTIVENESS IN WORKING WITH OTHERS	○	INEFFECTIVE IN WORKING WITH OTHERS. DOES NOT COOPERATE.	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS.	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES.	WORKS IN HARMONY WITH OTHERS. A VERY GOOD TEAM WORKER.	EXTREMELY EFFECTIVE IN WORKING WITH OTHERS. ACTIVELY PROMOTES HARMONY. ☒
4. LEADERSHIP CHARACTERISTICS	○	OFTEN WEAK. FAILS TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY.	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS.	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY.	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY. ☒	ALWAYS DEMONSTRATES OUTSTANDING INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ☐
5. JUDGEMENT	○	DECISIONS AND RECOMMENDATIONS OFTEN WRONG OR INEFFECTIVE.	JUDGEMENT IS USUALLY SOUND BUT MAKES OCCASIONAL ERRORS.	SHOWS GOOD JUDGEMENT RESULTING FROM SOUND EVALUATION OF FACTORS.	SOUND, LOGICAL THINKER. CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS. ☒	CONSISTENTLY ARRIVES AT RIGHT DECISIONS. AN AUTHORITY ON HIGHLY COMPLEX MATTERS. ☐
6. ADAPTABILITY	○	UNABLE TO PERFORM ADEQUATELY IN OTHER THAN ROUTINE SITUATIONS.	PERFORMANCE DECLINES UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS.	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS.	PERFORMANCE EXCELLENT EVEN UNDER PRESSURE OR IN DIFFICULT SITUATIONS.	OUTSTANDING PERFORMANCE UNDER EXTREME STRESS. MEETS THE CHALLENGE OF DIFFICULT SITUATIONS. ☐
7. USE OF RESOURCES	(M) (P)	INEFFECTIVE IN CONSERVATION OF RESOURCES. MATERIEL PERSONNEL	USES RESOURCES IN A BARELY SATISFACTORY MANNER. MATERIEL PERSONNEL	CONSERVES BY USING ROUTINE PROCEDURES. MATERIEL PERSONNEL	EFFECTIVELY ACCOMPLISHES SAVINGS BY DEVELOPING IMPROVED PROCEDURES. MATERIEL PERSONNEL	EXCEPTIONALLY SKILLED IN USING RESOURCES. MATERIEL PERSONNEL
8. WRITING ABILITY AND ORAL EXPRESSION	(W) (S)	UNABLE TO EXPRESS THOUGHTS CLEARLY. LACKS ORGANIZATION. WRITE SPEAK	EXPRESSES THOUGHTS SATISFACTORILY ON ROUTINE MATTERS. WRITE SPEAK	USUALLY ORGANIZES AND EXPRESSES THOUGHTS CLEARLY AND CONCISELY. WRITE SPEAK	CONSISTENTLY ABLE TO EXPRESS IDEAS CLEARLY. WRITE SPEAK	OUTSTANDING ABILITY TO COMMUNICATE (WRITTEN) (ORAL) WITH OTHERS. WRITE SPEAK

IV. MILITARY QUALITIES (Consider how this officer meets Air Force standards.)

	NOT OBSERVED					
	○	BEARING OR BEHAVIOR INTERFERE SERIOUSLY WITH HIS EFFECTIVENESS.	CARELESS BEARING AND BEHAVIOR DETRACT FROM HIS EFFECTIVENESS.	BEARING AND BEHAVIOR CREATE A GOOD IMPRESSION.	ESPECIALLY GOOD BEHAVIOR AND BEARING. CREATES A VERY FAVORABLE IMPRESSION. ☒	BEARING AND BEHAVIOR ARE OUTSTANDING. EXEMPLIFIES TOP MILITARY STANDARDS. ☐

AF [illegible] 77 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL EXHAUSTED. AFPER THIS FORM. PREVIOUS EDITIONS WILL BE OBSOLETE.

EXHIBIT B-1

COMPANY GRADE OFFICER EFFECTIVENESS REPORT

V. OVER-ALL EVALUATION (Compare this officer ONLY with officers of the same grade.)

SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS						SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS	
UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT		VERY FINE	EXCEPTIONALLY FINE	OUTSTANDING
☐	☐	☐	☐	☐	☐ ☐	☒	☐

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME ☐	2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES ☐
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES ☒	4. OUTSTANDING GROWTH POTENTIAL BASED ON DEMONSTRATED PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES ☐

VII. COMMENTS FACTS AND SPECIFIC ACHIEVEMENTS: Captain Glines clearly is the most competent navigator within my flight, and probably the most competent within the entire group. My observations of him during several MAC support missions makes me completely confident of his exceptionally high level of skills, knowledge, and judgment. He has been among the most active, if not the most active, participant in the Reserve Program. His flying time during the past 12 months was approximately 800 hours. He has flown all available Flying Training Periods, has made himself available for MAC support missions on an almost unlimited basis and has performed a number of "fill in" administrative duties for the squadron when needed. His work has been uniformly excellent. His mobilization potential is of the highest. STRENGTHS: In addition to the highly superior navigational competence described above, Captain Glines is an officer possessing superior leadership potential. He is highly intelligent, dependable, and thoroughly considerate of the needs of others. Further, Captain Glines has the courage, as well as the ability and initiative, to assume responsibility where appropriate. SUGGESTED ASSIGNMENTS: Captain Glines is currently awaiting reassignment to the 349th MAG. After his requalification in the new aircraft I would anticipate he should progress rapidly to instructor and flight examiner. SELF IMPROVEMENT EFFORTS: Captain Glines is currently taking a correspondence course in Evaluation of Financial Reports, a graduate level course given by the University of California. He has applied for entrance to the graduate school of Economics at UC. OTHER COMMENTS: Captain Glines' transfer will be a loss keenly felt by this unit. His performance has been outstanding. Captain Glines has used his personal and professional capabilities to actively promote equal opportunity programs. **Captain Glines is a student studying for his Masters Degree.**

VIII. REPORTING OFFICIAL

NAME, GRADE, AFSN SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
JOHN M COHAN, Major 564-38-5683FV, 314th TASq McClellan AFB, Calif (AFRES)	Flight Commander		John M Cohan
	AERO RATING: Sr Navigator	CODE: 1	DATE: 7 July 72

IX. REVIEW BY INDORSING OFFICIAL

I have observed the performance of Captain Glines and concur with the remarks and ratings of the reporting official.

NAME, GRADE, AFSN SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
CHESTER W ANDERS, Lt Colonel 317-14-7511FV, 314th TASq McClellan AFB, Calif (AFRES)	Squadron Commander		Chester W Anders
	AERO RATING: Command Pilot	CODE: 1	DATE: 10 July 72

B-2

17 JUL 1972
22 AUG 72

LAST NAME-FIRST NAME-MIDDLE INITIAL	AFSN/SSAN	ACTIVE DUTY GRADE
Glines, Albert E	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

[X] SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	☐ LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION

FROM	THRU	FROM	THRU
30 Sep 71	31 May 72		

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT

Concur. The evaluation of this officer accurately portrays his performance and abilities. My contacts with him have impressed me with his potential.

John A Forsythe

JOHN A FORSYTHE, Colonel, 541-14-3967FV, 940th Tactical Airlift Group, Commander, 12 Jul 72

MICROFILMED 03 AUG 72

B-3

HISTORICAL RECORD COPY — PROCESSED BY DEAR — 15 AUG 1973

DATA (Read and follow carefully. Type or print clearly.) — 081

1. LAST NAME, FIRST NAME AND INITIAL	2. SSAN	3. ACTIVE DUTY BASE AND ADDRESS (CODE)	4. PERMANENT GRADE
Glines, Albert E.	552-52-9680 FV	NOHEAD	Captain
5. ORGANIZATION, COMMAND AND LOCATION	6. DEMO RATING / CODE	7. PERIOD OF REPORT	
301 MASq (Assoc) (AFRES) Travis AFB CA 94535	Navigator / 1	FROM 1 Jun 72 THRU 25 Feb 73	
	8. REASON FOR EXPIRATION OF REPORT: 199	9. REASON FOR REPORT: CRO	

II. PRESENT DUTY

PAFSC 1545L PAFSC 1545L SQUADRON NAVIGATOR C-141.

Navigates aircraft to accomplish cargo airlift and other assigned missions. Plans the navigational phase of each mission and insures that all navigational equipment is inspected and preflighted. Performs minor in-flight maintenance and maintains flight logs and records.

III. RATING FACTORS (Consider how this officer is performing on his job)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES		SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB	WELL INFORMED ON MOST PHASES OF HIS JOB	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB. X	EXCEPTIONAL UNDERSTANDING OF HIS JOB. EXTREMELY WELL INFORMED ON ALL PHASES
2. PERFORMANCE OF DUTIES		QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY	PRODUCES VERY HIGH QUANTITY AND QUALITY OF WORK. MEETS ALL SUSPENSES. X	QUALITY AND QUANTITY OF WORK ARE CLEARLY SUPERIOR AND TIMELY
3. EFFECTIVENESS IN WORKING WITH OTHERS		INEFFECTIVE IN WORKING WITH OTHERS. DOES NOT COOPERATE	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS.	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES	WORKS IN HARMONY WITH OTHERS. A VERY GOOD TEAM WORKER	EXTREMELY SUCCESSFUL IN WORKING WITH OTHERS. ACTIVELY PROMOTES HARMONY X
4. LEADERSHIP CHARACTERISTICS		OFTEN WEAK. FAILS TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY X	ALWAYS DEMONSTRATES OUTSTANDING INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY
5. JUDGEMENT		DECISIONS AND RECOMMENDATIONS OFTEN UNSOUND OR INEFFECTIVE	JUDGEMENT IS USUALLY SOUND BUT MAKES OCCASIONAL ERRORS	USUALLY GOOD JUDGEMENT RESULTING FROM THOROUGH EVALUATION OF FACTORS	SOUND, LOGICAL THINKER. CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS X	UNFAILINGLY ARRIVES AT RIGHT DECISION EVEN IN HIGHLY COMPLEX MATTERS
6. ADAPTABILITY		UNABLE TO PERFORM ADEQUATELY IN OTHER THAN ROUTINE SITUATIONS	PERFORMANCE DECLINES UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS	PERFORMANCE EXCELLENT EVEN UNDER PRESSURE OR IN DIFFICULT SITUATIONS X	OUTSTANDING PERFORMANCE WHEN FACING THE CHALLENGE OF DIFFICULT SITUATIONS
7. USE OF RESOURCES		INEFFECTIVE IN CONSERVATION OF RESOURCES (M / P)	USES RESOURCES IN A BARELY SATISFACTORY MANNER (MATERIAL / PERSONNEL)	CONSERVES BY USING ROUTINE PROCEDURES (MATERIAL / PERSONNEL)	EFFECTIVELY ACCOMPLISHES SAVINGS BY DEVELOPING IMPROVED PROCEDURES (MATERIAL X / PERSONNEL X)	EXCEPTIONALLY EFFECTIVE IN USING RESOURCES (MATERIAL / PERSONNEL)
8. WRITING ABILITY AND ORAL EXPRESSION		UNABLE TO EXPRESS THOUGHTS CLEARLY ON ROUTINE MATTERS (W / S)	EXPRESSES THOUGHTS SATISFACTORILY ON ROUTINE MATTERS (W / S)	USUALLY INCISIVE AND EXPRESSES THOUGHTS CLEARLY AND CONCISELY (W / S)	CONSISTENTLY ABLE TO EXPRESS IDEAS CLEARLY (W X / S X)	OUTSTANDING ABILITY TO COMMUNICATE IDEAS TO OTHERS (W / S)
9. MILITARY QUALITIES (Consider how this officer meets Air Force standards)		BEARING AND APPEARANCE FALL SOMEWHAT BELOW AIR FORCE STANDARDS	BEARING AND APPEARANCE MEETS AIR FORCE STANDARDS	BEARING AND APPEARANCE MEETS A GOOD IMPRESSION	ESPECIALLY GOOD BEARING AND APPEARANCE. CREATES A VERY FAVORABLE IMPRESSION X	BEARING AND APPEARANCE ARE OUTSTANDING. IS EXEMPLARY FOR OTHERS TO EMULATE

AF [illegible] PREVIOUS EDITION WILL BE USED

EXHIBIT C-1 COMPANY GRADE OFFICER EFFECTIVENESS REPORT

002

V. OVER-ALL EVALUATION (Compare this officer ONLY with officers of the same grade)

UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT			VERY FINE		EXCEPTIONALLY FINE (SPECIFIC JUSTIFICATION REQUIRED FOR THESE SECTIONS) X	OUTSTANDING

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME	2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES X	4. OUTSTANDING GROWTH POTENTIAL BASED ON KNOWN TOTALLY PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES

VII. COMMENTS

FACTS AND SPECIFIC ACHIEVEMENTS: Capt Glines has made significant contributions of his time and talent to the Air Force Reserve program since joining the 93d MAGp (Assoc) (AFRES). Capt Glines has attended the C-141 navigator training course at Altus AFB, Oklahoma, where he distinguished himself by graduating second in his class. Capt Glines has also received a recommendation for a checkride in the minimum amount of time. He has devoted 45 days of his time to Active Duty during the past three months and has flown several overwater training missions during that period. He has the additional duties of Squadron Communications Security Officer and Plans Officer. In this capacity, he has developed a communications security briefing to be conducted at his monthly unit training assemblies. He has also contributed significantly to the development of his unit's operations plans. Because of his potential, Capt Glines has been selected to attend the C-5 navigator training course at Altus AFB, Oklahoma. His participation in the Air Force Reserve has been excellent and he has accumulated the maximum allowable number of additional flying training periods. STRENGTHS: Capt Glines is an energetic, zealous officer and has a cooperative attitude. He is easy to get along with and gets along well with others. He has excellent potential and is a dedicated officer. SUGGESTED ASSIGNMENTS: Capt Glines should be upgraded to line navigator as soon as possible and is recommended for attendance at the C-5 navigator training school. OTHER COMMENTS: Capt Glines is athletically inclined and in this regard, enjoys coaching a softball team. His civilian occupation is that of automobile salesman.

VIII. REPORTING OFFICIAL

NAME, GRADE, SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
FRANK L. JACKSON, Major, USAFR 445-32-8157 FV812 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator		Frank L Jackson
	DEMO RATING: Senior Nav	CODE: 1	DATE: 3 April 1973

IX. REVIEW BY INDORSING OFFICIAL

I concur with the comments and ratings of the reporting official. Capt Glines is energetic and possesses a strong desire to do an exceptional job for the Reserve program. Due to his rapid progression and fine attitude, I have selected him for conversion to the C-5 Associate Reserve squadron.

NAME, GRADE, SSAN, AND ORGANIZATION	DUTY TITLE		SIGNATURE
EDMOND F. COOLEY, JR., Major, USAFR, 508-34-1945 FV301 MASq (Assoc), Travis AFB, CA (AFRES)	Squadron Navigator		Edmond F Cooley Jr
	DEMO RATING: Master Nav	CODE: 1	DATE: 3 April 1973

C-2

21 083

MICROFILMED 02 MAY 73

LAST NAME-FIRST NAME-MIDDLE INITIAL	SSAN	ACTIVE DUTY GRADE
GLINES, ALBERT E.	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

☒ SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	☐ LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION

FROM	THRU	FROM	THRU
1 Jun 72	25 Feb 73		

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT

Captain Glines' excellent ability as a C-141 navigator was demonstrated when he attended the C-141 navigator training course and graduating second in his class. I concur with the reporting and indorsing officials.

CHARLES H. MICHAEL, Colonel, USAFR, 568-28-2982FV, 938 Mil Alft Gp (ASSOC)(AFRES), Commander, 6 April 1973

AF FORM 77a JUL 69 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED. C-3

SUPPLEMENTAL SHEET TO AF FORMS 77, 707, 909, 910, 911 AND 475

MICROFILMED 1 MAY 73 APDS PROCESSED 31 OCT 1973

719

I. IDENTIFICATION DATA

1. LAST NAME-FIRST NAME-MIDDLE INITIAL	2. SSAN	3. ACTIVE DUTY GRADE	4. PERMANENT GRADE
Glines, Albert E.	552-52-9680FV	NONEAD	Captain

5. ORGANIZATION, COMMAND AND LOCATION	6. AERO RATING	CODE	7. PERIOD OF REPORT
301 MASq (Assoc) (AFRES) Travis AFB CA 94535	Sr Nav	1	FROM 26 Feb 73 THRU 29 Jul 73
	8. PERIOD OF SUPERVISION: 154		9. REASON FOR REPORT: CRO

II. PRESENT DUTY

PAFSC 1545L DAFSC 1545L SQUADRON NAVIGATOR C-141.

Navigates aircraft to accomplish cargo airlift and other assigned missions. Plans the navigational phase of each mission and insures that all navigational equipment is inspected and preflighted. Performs minor in-flight maintenance and maintains flight logs and records.

III. RATING FACTORS (Consider how this officer is performing on his job.)

	NOT OBSERVED					
1. KNOWLEDGE OF DUTIES	○	SERIOUS GAPS IN HIS KNOWLEDGE OF FUNDAMENTALS OF HIS JOB	SATISFACTORY KNOWLEDGE OF ROUTINE PHASES OF HIS JOB	WELL INFORMED ON MOST PHASES OF HIS JOB	EXCELLENT KNOWLEDGE OF ALL PHASES OF HIS JOB	X
2. PERFORMANCE OF DUTIES	○	QUALITY OR QUANTITY OF WORK OFTEN FAILS TO MEET JOB REQUIREMENTS	PERFORMANCE MEETS ONLY MINIMUM JOB REQUIREMENTS	QUANTITY AND QUALITY OF WORK ARE VERY SATISFACTORY	PROCEEDS VERY WITH QUALITY AND QUANTITY OF WORK MEETS ALL RESPONSES	X
3. EFFECTIVENESS IN WORKING WITH OTHERS	○	INEFFECTIVE IN WORKING WITH OTHERS DOES NOT COOPERATE	SOMETIMES HAS DIFFICULTY IN GETTING ALONG WITH OTHERS	GETS ALONG WELL WITH PEOPLE UNDER NORMAL CIRCUMSTANCES	WORKS IN HARMONY WITH OTHERS A VERY GOOD TEAM WORKER	X
4. LEADERSHIP CHARACTERISTICS	○	OFTEN HESITATES TO SHOW INITIATIVE AND ACCEPT RESPONSIBILITY	INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY ADEQUATE IN MOST SITUATIONS	SATISFACTORILY DEMONSTRATES INITIATIVE AND ACCEPTS RESPONSIBILITY	DEMONSTRATES A HIGH DEGREE OF INITIATIVE AND ACCEPTANCE OF RESPONSIBILITY	X
5. JUDGEMENT	○	DECISIONS AND RECOMMENDATIONS OFTEN WRONG OR INEFFECTIVE	JUDGEMENT IS USUALLY SOUND BUT MARED OCCASIONAL LAPSES	SHOWS GOOD JUDGEMENT IN SELECTING FACTORS FOR EVALUATION OF FACTORS	SOUND LOGICAL THINKER CONSIDERS ALL FACTORS TO REACH ACCURATE DECISIONS	X
6. ADAPTABILITY	○	UNABLE TO PERFORM EFFECTIVELY IN OTHER THAN ROUTINE SITUATIONS	PERFORMANCE DECLINES SOMEWHAT UNDER STRESS OR IN OTHER THAN ROUTINE SITUATIONS	PERFORMS WELL UNDER STRESS OR IN UNUSUAL SITUATIONS	PERFORMANCE EXCELLENT EVEN WHEN FACED WITH DIFFICULT SITUATIONS	X
7. USE OF RESOURCES	○	INEFFECTIVE IN CONSERVATION OF RESOURCES	USES RESOURCES IN A MANNER SATISFACTORY UNDER	CONSERVES BY USING ROUTINE PROCEDURES	EFFECTIVELY ACCOMPLISHES GOALS BY DEVELOPING IMPROVED PROCEDURES	EXCEPTIONALLY EFFECTIVE IN USING RESOURCES
8. WRITING ABILITY AND ORAL EXPRESSION	○	UNABLE TO EXPRESS THOUGHTS CLEARLY IDEAS DISORGANIZED	EXPRESSES THOUGHTS FAIRLY ON ROUTINE MATTERS	USUALLY EXPRESSES IDEAS CLEARLY AND CONCISELY	NOTICEABLY ABLE TO EXPRESS IDEAS CLEARLY	X
IV. MILITARY QUALITIES (Consider how this officer meets Air Force standards.)						
	○	BEARING OR BEHAVIOR INTERFERE SERIOUSLY WITH HIS EFFECTIVENESS	LOWERS HIS EFFECTIVENESS	BEARING OR BEHAVIOR CREATES A GOOD IMPRESSION	BEARING AND BEHAVIOR CREATES A VERY FAVORABLE IMPRESSION	X

AF FORM 77 PREVIOUS EDITION WILL BE USED

COMPANY GRADE OFFICER EFFECTIVENESS REPORT

EXHIBIT D-1

V. OVER-ALL EV... (Compare this officer ONLY with officers in same grade)

UNSATISFACTORY	MARGINAL	BELOW AVERAGE	EFFECTIVE AND COMPETENT	VERY FINE	EXCEPTIONALLY FINE	OUTSTANDING
					X	

VI. PROMOTION POTENTIAL

1. DOES NOT DEMONSTRATE A CAPABILITY FOR PROMOTION AT THIS TIME.
2. PERFORMING WELL IN PRESENT GRADE. SHOULD BE CONSIDERED FOR PROMOTION ALONG WITH CONTEMPORARIES
3. DEMONSTRATES CAPABILITIES FOR INCREASED RESPONSIBILITY. CONSIDER FOR ADVANCEMENT AHEAD OF CONTEMPORARIES — X
4. OUTSTANDING GROWTH POTENTIAL BASED ON DEMONSTRATED PERFORMANCE. PROMOTE WELL AHEAD OF CONTEMPORARIES

VII. COMMENTS

FACTS AND SPECIFIC ACHIEVEMENTS: Capt Glines has performed his duties in an exceptionally fine manner throughout the period of this report. His participation and performance in all scheduled unit training assemblies have been especially noteworthy. His effective use of materiel and personnel while serving as Manuals Control Officer demonstrated his great efficiency and success while working with others. Capt Glines has proven to be a competent and professional navigator. The examiner on his recent C-141 initial evaluation had many favorable comments on his performance. In order to broaden his technical knowledge, he also accumulated the maximum number of additional flying training periods. Because of his proven abilities, he has been selected to transition to the highly sophisticated C-5A aircraft and entered training on 30 July 1973. He has expressed a high degree of enthusiasm for this assignment and will undoubtedly be an asset to the 301 MASq.
STRENGTHS: Capt Glines is a conscientious officer who will see a project through to its completion. He has excellent potential and gets along well with others.
SUGGESTED ASSIGNMENTS: In order to best utilize his talents, Capt Glines should be upgraded to navigator immediately upon his return from formal C-5A school.
OTHER COMMENTS: Capt Glines' devoted interest and outstanding abilities in the field of athletics have aided greatly in the high success of the local softball program where he volunteers his services as a coach and manager. His civilian employment is that of an automobile salesman. Capt Glines promotes the Equal Opportunity Program.

VIII. REPORTING OFFICIAL

NAME, GRADE, SSAN AND ORGANIZATION	DUTY TITLE	SIGNATURE
CHARLES EGIZIANO, Capt, USAFR 127-30-6610FV, 301 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator	Charles Egiziano
	SENIOR RATING: Senior Nav	CODE: 1
		DATE: 20 August 1973

IX. REVIEW BY INDORSING OFFICIAL

I concur with the above report. Capt Glines is an officer whose full potential has not yet been realized. He should be an asset to the 301 MASq.

NAME, GRADE, SSAN AND ORGANIZATION	DUTY TITLE	SIGNATURE
JOEL V. FALK, Capt, USAFR 503-34-5303FV, 301 MASq (Assoc) Travis AFB, CA (AFRES)	Squadron Navigator	Joel V. Falk
	SENIOR RATING: Navigator	CODE: 1
		DATE: 20 August 1973

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LAST NAME-FIRST NAME-MIDDLE INITIAL	SSAN	ACTIVE DUTY GRADE
Glines, Albert E.	552-52-9680FV	NONEAD

(CHECK APPROPRIATE BLOCK AND COMPLETE AS APPLICABLE)

[X] SUPPLEMENTAL SHEET TO RATING FORM WHICH COVERS THE FOLLOWING PERIOD OF REPORT	[ ] LETTER OF EVALUATION COVERING THE FOLLOWING PERIOD OF OBSERVATION
FROM: 26 Feb 73 — THRU: 29 Jul 73	FROM: — THRU: —

Precede comments by appropriate data, i.e. section continuation, indorsement continuation, additional indorsement, etc. Follow comments by the authentication to include: name, grade, AFSN, organization, duty title, date and signature.

ADDITIONAL INDORSEMENT: I concur. Capt Glines in addition to flying has made himself available for additional duties during the unit training assemblies. I personally assigned him several projects in the Navigator Section and he completed them professionally and with dispatch. Recommend Capt Glines enroll in Air Command and Staff College by correspondence in order to better utilize his administrative and managerial abilities.

Edmond F. Cooney Jr

EDMOND F. COONEY, JR., Major, USAFR, 508-34-1945FV, 301 MASq (Assoc), Squadron Navigator, 20 August 1973

ADDITIONAL INDORSEMENT: Capt Glines has demonstrated his dedication and ability through a high level of participation. I concur with this evaluation and the recommendations of his reporting and indorsing officials to upgrade as C-5 navigator and increase his professional skills through correspondence courses.

B. C. MEANS, Colonel, USAFR, 551-12-5762FV 349 Mil Aft Wg (Assoc), (AFRES), Commander, 28 August 1973

AF FORM 77a JUL 69 PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED.

SUPPLEMENTAL SHEET TO AF FORM 707, 909, 910, 911 AND 475

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AFFIDAVIT OF ERIC A. SEITZ

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ERIC A. SEITZ, being first duly sworn on oath, deposes and says:

1. I am an attorney admitted to practice before the Supreme Court of the United States, before state courts in California and Hawaii, and before numerous federal courts for trial and appellate proceedings.

2. Currently I am engaged in the private practice of law with offices located at 681 South King Street, Suite 200, Honolulu, Hawaii 96813.

3. Commencing in September, 1972, I represented an individual named PATRICK CHENOWETH in connection with his trial before a Navy court-martial on charges alleging, in substance, acts of sabotage to the aircraft carrier U.S.S. Ranger.

4. The court-martial proceedings in Mr. CHENOWETH's case occurred over a period of several months at the United States Naval Base, Treasure Island, California, terminating on or about June 5, 1973, by findings of the military court that he was not guilty of the specifications and charges on which he was tried.

5. During the entire period of time, from his arrest in July, 1972, until his acquittal in early June, 1973, Mr. CHENOWETH was confined without bail at the correctional facility on Treasure Island. A petition for habeas corpus was filed in his behalf and ultimately

reached the Supreme Court upon a petition for certiorari, resulting in the Order that is appended hereto as Exhibit A.

/s/ E.A. Seitz
ERIC A. SEITZ

Subscribed and sworn to
before me this 3rd day
of July, 1979.

/s/ Marilyn Joy Barbain
Notary Public, First
Judicial Circuit, State of Hawaii

My commission expires: 5/1/83

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
October 9, 1973

Eric A. Seitz, Esq.
405 Capp Street
San Francisco, Calif. 94110

RE: CHENOWETH v. WARNER, SEC'Y of NAVY, et al., 72-6812

Dear Sir:

The Court today entered the following order in the above-entitled case:

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Northern District of California with directions to dismiss the case as moot.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By
/s/ HELEN TAYLOR
Helen Taylor, (Mrs.)
Assistant Clerk

AIRMAIL

RECEIVED OCT 30 1973